Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1214

ARTHUR T. DAVIDSON, M.D.,

Petitioner,

—against—

COLUMBIA UNIVERSITY, AND OFFICERS OF COLUMBIA UNIVERSITY, PRESIDENT ANDREW W. CORDIER, DEAN H. HOUSTON MERRITT, DR. GEORGE H. HUMPHREYS, II, DR. FREDERIC P. HERTER and WILLIAM PETERSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

ARTHUR T. DAVIDSON, M.D., Esq.
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Respondents.

Petition for a Writ of Certiorari to the Court of Appeals, State of New York

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals, State of New York, entered in the above-entitled case on November 22, 1977.

Citations to Opinions Below

The opinions of the County Court of the Appellate Division, Second Department and of the Court of Appeals of the State of New York are set forth in the Appendix attached hereto, infra, pp. 4a, 12a, and 14a.

Jurisdiction

The judgment of the Court of Appeals was entered on November 22, 1977, (p. 14a, infra). Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1), petitioner having asserted below and claiming here, denial of rights, privileges and immunities secured by the First Amendment to the Constitution of the United States.

Question Presented

Whether the employment of a tenured teacher can be terminated solely because of the exercise by the teacher of his constitutionally protected right of "Freedom of Speech"?

Constitutional Provision Involved

This case involves the "Freedom of Speech" clause of the First Amendment of the Constitution of the United States.

Statement of the Case

In March, 1964, Petitioner was appointed an Attending Surgeon, General Surgery, Harlem Hospital with life tenure.

Petitioner faithfully, fully, and in a highly satisfactory manner, for a period of approximately three years, performed all of the duties associated with this position.

In May, 1964, Columbia University entered into an agreement with the City of New York to be responsible for the contractual employment of the professional staff of Harlem Hospital. In the Spring of 1967, Columbia University became involved in a dispute with New York

University over the amount of bed space to be alloted to Columbia University at Bellevue Hospital. As a result of this dispute Columbia University decided to withdraw from Bellevue Hospital and transfer the majority of its physicians to Harlem Hospital.

In May, 1967, Petitioner was informed that Dr. J. Ferrer, the newly appointed White Director of Surgery at Harlem Hospital intended to bring a number of surgeons with him from Bellevue Hospital to Harlem Hospital, in particular, one White surgeon, Dr. P. Wiedel who Dr. Ferrer was most desirous of placing in a very high position at Harlem Hospital.

Petitioner in June, 1967, discussed the plans of Columbia University to replace him with a White surgeon with Dr. N. Houston Merritt, Dean of the College of Physicians and Surgeons of Columbia University. Dean Merritt told Petitioner he was going to discuss the situation very frankly with him, that since both Dr. Ferrer and Dr. Wiedel were White, and Petitioner was Black, he would have to support the removal even though it was unfair, racially motivated and without cause. Petitioner pointed out to Dean Merritt that Dr. Wiedel will have a dual appointment, one at Presbyterian Hospital and that of Section Chief of Harlem Hospital. Dean Merritt replied that Petitioner's analysis was indisputable, and irrefutable. However, since he and Petitioner both being mature adults should appreciate the fact that regardless of the justice of merit of the situation, if the difference was between a Black and White participant, the unspoken code was that the White point of view would always prevail.

Petitioner sought aid from the New York City Commission on Human Rights in Petitioner's aim to retain his position as Chief of Section B, General Surgery, Harlem Hospital, and in connection therewith Petitioner engaged Counsel. Following several meetings between Petitioner,

Counsel for Petitioner, officials of Columbia University, Counsel for Columbia University, and members of the New York City Commission on Human Rights, an agreement was reached whereby Petitioner was to spend a year at Columbia University and then return to Harlem Hospital as "Chief of a surgical section or in some other mutually agreeable, equivalent position."

However, at the end of this year, Columbia University refused to honor its agreement with Petitioner and requested that Petitioner spend an additional year at Columbia University.

In the Summer of 1969, Columbia University offered to employ Petitioner in a lesser position of employment at Harlem Hospital. Petitioner pointed out that his agreement called for his return to the clinical service at Harlem Hospital as Chief of a Surgical Section or in some other mutually agreeable equivalent position.

In July 1968, Petitioner wrote a private, personal letter to an individual regarding the care of Black patients by Columbia University at Harlem Hospital and Frances Delafield Hospital—specifically in regards to the failure of the Columbia University Officials to transfer Black patients with Cancer to Frances Delafield Hospital for X-ray treatment. This failure of transfer was a direct violation of an agreement between the New York City Department of Hospitals and Columbia University.

The letter—without petitioner's approval or request—was published in a local, weekly Harlem Newspaper, called "The Amsterdam News". The Columbia University Officials became very angry at petitioner for writing this private, personal letter and stated that unless he publicly withdrew and retracted his criticism of Columbia University he would not be allowed on the Surgical Service in any position. Petitioner stated that his action—in writing

a personal, private letter was completely protected by the First Amendment to the Constitution of the United States. Petitioner refused to retract his statement. Thereupon Columbia University terminated petitioners' employment and refused and has continued to refuse to assign him to any position at Harlem Hospital in spite of petitioner's demonstrated superior qualifications and ability as a Surgeon.

The New York State Supreme Court action, entitled *Davidson* v. *Columbia University, et al.*, Index No. 2755/71 was heard in the latter part of 1975 by Justice Donohoe, an elderly retired Justice from an upstate New York County. He ruled against Petitioner on the basis of the fact that "the Plaintiff . . . breached his duty of loyalty by making public, unfounded charges against the University" and because of the lack of mutuality of remedy."

It is quite obvious that Judge Donohoe's ruling was completely and totally contrary and in opposition to established Federal law. Petitioner was exercising his constitutionally protected, First Amendment right of "Freedom of Speech" in speaking out against the medical treatment rendered Black patients.

The Appellate Division of the Second Department affirmed the judgment of the County Court and the Court of Appeals of the State of New York denied Plaintiff's Motion for Leave to appeal to the Court of Appeals.

Reasons for Granting the Writ

The case involves a constitutional question that affects the life of every American, that is, the exercise of his "Constitutionally protected right of 'Freedom of Speech' as delineated in the First Amendment of the Constitution of the United States." This protection is of paramount importance to University teachers.

Mr. Justice Frankfurter in the Concurring Opinion in *Kovacs* v. *Cooper* states that the Constitutional Guarantee of Freedom of Speech by the First Amendment is so fundamentally important to the progress of civilization that it holds a "preferred position of Freedom of Speech" in regards to the other Amendments of the U.S. Constitution.

Kovacs v. *Cooper*, 336 U.S. 77, 90-95.

1.

The Ruling of the Court Below that the Plaintiff breached his duty of loyalty by "Making Public, Unfounded Charges Against the University" is an Absolute and Clear Violation of Plaintiff's Constitutionally Protected Right of "Freedom of Speech."

The County Court in its Memorandum of Judgment found that "all of these offers [Columbia University] were contingent upon his [Plaintiff] retracting his charges of genocide (195-198 S.M., Ex. O). Plaintiff was told that the charge which he had made was a serious one and that he was not wanted in any position unless he retracted them. He refused (84-85, 198 S.M.)."

It is, therefore, perfectly obvious that the ruling of the Court below is in complete and total conflict with Plaintiff's Constitutionally protected right of "Freedom of Speech" under the First Amendment of the United States Constitution.

The United States Supreme Court has consistently, repeatedly, emphatically—throughout the years—held that the Constitutional right of Freedom of Speech is the most cherished of all of the amendments of the United States Constitution.

The U.S. Supreme Court has warned that "our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is, therefore, a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

Keyishiam v. *Board of Regents*, 385 U.S. 589, 603.

In Perry v. Sindermann, the Respondent was a teacher in the State College System in the State of Texas for a decade before the Board of Regents of Odessa Junior College decided not to renew his contract. He brought suit in Federal District Court claiming that the decision not to rehire him was in retaliation for his public criticism of the policies of the college administration in violation of the First Amendment. The United States Supreme Court held that the Respondent has presented a bona fide First Amendment claim that should be considered fully by the U.S. District Court.

Perry v. *Sindermann*, 408 U.S. 593 (1972).

In *Board of Regents* v. *Roth*, Respondent was hired as an Assistant Professor of Political Science at Wisconsin State University Oshkosh for the 1968-1969 academic year. During the course of that year he was told that he would not be rehired for the next academic term. The Court was of the opinion that if his non-renewal implicated the First Amendment, then Roth, was deprived of his constitutional rights because his employment was conditioned on a surrender of First Amendment Rights.

Board of Regents v. *Roth*, 408 U.S. 564 (1972).

In *Wieman* v. *Updegraff*, the Court held that an applicant could not be denied the opportunity for public em-

ployment because he had exercised his First Amendment rights.

Wieman v. *Updegraff*, 344 U.S. 183.

In New York Times Co. v. *Sullivan*, the U.S. Supreme Court held that neither; (1) factual error nor (2) defamatory content suffices to remove the constitutional shield from criticism of official conduct. Indeed, the combination of the two is also inadequate to remove this First Amendment right.

New York Times Co. v. *Sullivan*, 375 U.S. 255.

In *Watchtower Bible and Tract Society* v. *Metropolitan Life Insurance Company*, the Court delineated the broad extent to which the protection of Freedom of Speech extends under the United States and New York State Constitutions by holding that in the exercise of the constitutional right of freedom of speech, freedom of worship, one may disseminate his views no matter how unorthodox or abhorrent they may seem to others.

Watchtower Bible and Tract Society v. *Metropolitan Life Insurance Company*, 69 N.Y.S. 2d, 385 *aff.* 75 N.Y.S. 2d 81, *cert. denied*, 69 S. Ct., 273, *rehearing denied*, 69 S. Ct. 479 (1947).

Indeed the Appellate Division of the New York State Supreme Court, and the Court of Appeals have consistently and uniformly held throughout the years that the expression of controversial, unpopular, unpleasant, or offensive views are precisely protected by both the New York State and Federal Constitutions.

In *Mandole* v. *Barnes*, the Court held that "expression of controversial and unpopular view is precisely what is protected by both Federal and New York State Constitutions."

Mandole v. *Barnes*, 282 N.Y.S. 2d 225 (1967);

East Meadow Community Concerts Association v. *Board of Education of Union Free School District No. 3, Nassau County*, 272, N.Y.S. 2d 341, *aff.*, 273 N.Y.S. 2d 736 (1966).

In *Hemingway's Estate* v. *Random House, Inc.*, the Court held the First Amendment to the U.S. Constitution prohibits restraint on volunteer public expression of ideas and shields the man who speaks when others wish him to be quiet.

Hemingway's Estate v. *Random House, Inc.*, 296 N.Y.S. 2d 771 (1968).

In *Hamilton* v. *Brennan*, the Court forcefully stated that the right to think and speak freely extends to the unpopular as well as to the popular cause and when the right is menaced it must be vindicated, however, loud the clamor and insistent the pressure for its denial.

Hamilton v. *Brennan*, 119 N.Y.S. 2d 83 (1953).

The shield of the Freedom of Speech clause of the United States Constitution and New York State Constitution extends even further than to cover controversial and unpopular views, it even covers the distasteful and offensive. In *Rockwell* v. *Moore*, the N.Y. Court of Appeals held that even the right of a self-styled American Nazi to speak must be protected no matter how unpleasant or offensive.

Rockwell v. *Moore*, 211, N.Y.S. 2d 25 (1961).

It is to be noted that although Plaintiff in 1968 was speaking of the quality of care rendered to Black patients in Harlem Hospital almost prophetically the tide of human events has shown that White as well as Black middle-class as well as poor patients are the undeserving victims of unacceptable medical care and health care delivery in a high

percentage of supposedly "first-rate" hospitals. Indeed in a comprehensive study of the surgical care rendered in supposedly first class American hospitals, the report titled, "The Critical Incident Study of Surgical Deaths and Complications, 1973-1975" from an exhaustive self-examination sponsored by the American College of Surgeons and the American Surgical Association and written by Dr. Charles G. Childs III, Professor of Surgery at the University of Michigan, concluded that 47% or almost ½ of all post-operative complications and 35% (1/3) of deaths were preventable. In other words, these were needless deaths.

The question the U.S. Supreme Court has to decide is whether or not the guarantees of the "Freedom of Speech" clause of the First Amendment will be applied to Black Citizens of the United States or only to their White brothers.

2.

The Supreme Court System of the State of New York and Its Appellate Divisions are Racially Discriminatory in their Composition to the Exclusion of Blacks, Females and other Minority Groups.

The decisions of the County Court and of the Appellate Divisions of The New York State Supreme Court are a total miscarriage of justice and are completely and diametrically in opposition to all of the rulings of the Supreme Court of the United States. The only possible reason for such erroneous and palpably incorrect decisions is that the Supreme Court system of the State of New York and its Appellate Divisions were acting out of extreme racial bias. It is a matter of record that all of these courts are racially discriminatory in their make-up to the complete exclusion of Blacks, Females and other minority groups.

The United States Supreme Court has ruled consistently that such a situation is inherently discriminatory and constitutionally unacceptable.

It is, therefore, totally impossible for a Black Petitioner or a Petitioner of other minority groups to obtain the slightest degree of an impartial hearing before a tribunal racially exclusive to the degree that only White, middle-aged, middle-class males are in the control of the decision-making processes and rendering judicial opinions and decisions. History has shown that this class of individuals are uniformly and exclusively responsible for at least 99% of the vicious, malignant ills and catastrophic events that are destructive to society. The present financial crises of the City of New York with its fraudulent actions by its top officials as revealed by the Report of the Securities and Exchange Commission is a case in point.

The existence of such discriminatory bodies are traditionally due to the fact that White males have profited by an unfair advantage at the expense of the above-mentioned groups. (See Appendix, page 1a Editorial of Sunday, November 27, 1977, NEW YORK TIMES).[1]

The Supreme Court of the United States represents the last meager hope of survival of the judicial process of the State of New York. It is a matter of record that the State of New York has almost been drawn into the cesspool of destruction by the City of New York. History will record whether this Court has the courage and integrity to do its duty.

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[1] *The New York Times*, Sunday, November 27, 1977, "The Complaints of White Men."

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Dated: New Rochelle, N. Y.
February 3, 1978

Respectfully submitted,

/s/ ARTHUR T. DAVIDSON
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Attorney for Petitioner

IN THE

Supreme Court of the United States

October Term, 1977

No. .....

ARTHUR T. DAVIDSON, M.D.,
Petitioner,

—against—

COLUMBIA UNIVERSITY, AND OFFICERS OF COLUMBIA UNIVERSITY, et als.,
Respondents.

AFFIDAVIT OF SERVICE BY MAIL

ALBERT SENSALE, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Avenue, Brooklyn, New York.

That on the 15th day of February, 1978, deponent served the within Petition for a Writ of Certiorari to the Court of Appeals, State of New York, upon Thacher, Proffitt & Wood, Esqs., 40 Wall Street, New York, New York, Attorney(s) for the Respondents in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

this 15th day of February, 1978

APPENDIX

The New York Times, Sunday
November 27, 1977

THE NEW YORK TIMES
Founded in 1851

ADOLPH S. OCHS, *Publisher 1896-1935*
ARTHUR HAYS SULZBERGER, *Publisher 1935-1961*
ORVIL E. DRYFOOS, *Publisher 1961-1963*

ARTHUR OCHS SULZBERGER
Publisher

•

A.M. ROSENTHAL, *Executive Editor*
SEYMOUR TOPPING, *Managing Editor*
ARTHUR GELB, *Deputy Managing Editor*
JAMES L. GREENFIELD, *Assistant Managing Editor*
PETER MILLONES, *Assistant Managing Editor*
LOUIS SILVERSTEIN, *Assistant Managing Editor*

•

MAX FRANKEL, *Editorial Page Editor*
JACK ROSENTHAL, *Assistant Editorial Page Editor*
CHARLOTTE CURTIS, *Associate Editor*

•

JOHN B. OAKES, *Senior Editor*
TOM WICKER, *Associate Editor*

The Complaints of White Men

As the lists of our company officers testify each day on this page, we are an institution run mostly by white men. As in most other institutions, women and non-whites came later than white men into the hierarchies from which our managers have been chosen. Recognizing the inadequacy of the result, and faced with social and

legal pressures that we ourselves helped to generate, we have undertaken corrective measures, affirmative action, to expand opportunity in our company, in our profession and in our country. Sex and race are factors in our appraisal of qualified applicants.

Clearly, that effort is far from complete. Its success will show up only in future generations. But the effort itself has come increasingly under attack, as discrimination *against* white men, a pious tribute to conscience by one generation at the expense of deserving members of the next. White men complain, in our offices and on our front page, that any program of hiring or promotion or admission to schools that takes notice of race or sex is not only broadly unfair, or unconstitutional, but also specifically discriminatory against them—that it is "reverse discrimination." Steelworkers in Louisiana, firemen in Pittsburgh, teachers in Detroit and officials in Washington all raise variations of this protest against affirmative action and some are seeking redress in court.

We sensed the accumulating strength of this backlash while studying the Bakke case last summer. And if Mr. Bakke persuades the Supreme Court that race-conscious affirmative action at the Davis medical school of the University of California was illegal discrimination against him, then all forms of affirmative action would become instantly suspect and the subject of prolonged litigation. They would be abandoned in many places, quickly and tragically.

One complaint of white men is that any recognition of race or sex in the distribution of opportunity is illegal. But American law itself has been an instrument of discrimination and deprivation. The courts, as well as society, have acknowledged the wrong, identified the victims and called for relief and remedy. And where the law served discrimination by race or sex, it logically

must permit relief and remedy that recognize and compensate for race and sex.

There are two ways to escape this logic. One is to deny the problem: People are inherently unequal, endowed by their Creator with inherent personal talents and deficiencies and inherited social advantages and deprivations. All must play out the hand they've been dealt, no matter how cruel the handicap. The second and currently more fashionable response is to acknowledge the problem but to deny a remedy: Yes, not only the Creator and our forefathers but also our laws and institutions perpetrated dreadful wrong; it will never be permitted again. However, the innocent individual beneficiaries of those wrongs, who are far ahead in the race for opportunity, cannot now be penalized; henceforth, the race will be fair even though everyone's position in it is not.

Neither response is good enough. The law cannot suddenly decide to be neutral when for so long it favored white men. Neither can society. Not only some abstract concept of justice but the well-being of the American community depends upon affirmative action that can help to overcome the stigma and injury of the past. A multiplicity of programs in both private and public institutions is preferable here to the mandates of law or bureaucracies. But the effort itself is necessary.

To the complaint of white men that this complicates their lives as a group, there is only one honest reply: Sure it does. But if they are being deprived to some extent, it is only in the sense that they are losing opportunity which they would not have had without past discrimination. As for the charge that one generation is burdening the next, the answer again is: Of course. Everything done in one time burdens—and benefits—another time.

Judgment of County Court, County of Westchester, Entered March 25, 1976

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF WESTCHESTER

Index # 2755/1971

ARTHUR T. DAVIDSON,

Plaintiff,

—against—

COLUMBIA UNIVERSITY, and Officers of COLUMBIA UNIVERSITY, PRESIDENT ANDREW W. CORDIER, DEAN H. HOUSTON MERRITT, DR. GEORGE H. HUMPHREYS, II, DR. FREDERIC P. HERTER & WILLIAM PETERSON,

Defendants.

DONOHOE, J.,

Judgment is granted to the defendants dismissing the complaint.

This is an action for damages for breach of contract, or in the alternative, for specific performance of the contract. The plaintiff, a medical doctor, sued upon an agreement in letter form which he alleges the defendant breached by refusing to reassign him to the post of chief of a surgical section.

Plaintiff commenced this action on April 27, 1970, alleging defendant's breach of the agreement of August 21, 1967. The answer contains allegations that reassignment of the plaintiff was subject to mutual agreement, that reassignment of the plaintiff as Chief of Surgical Section B at Harlem Hospital was not agreeable to defendant Humphreys and that plaintiff declined assignment to equivalent, alternative positions. It further

alleges that plaintiff engaged in irresponsible conduct unbecoming of a physician in writing an open letter charging defendant university with practicing genocide and that he was censured following his failure to substantiate such charges. It also alleges that he unreasonably refused to accept assignment to equivalent positions.

The agreement upon which this action is based is entailed in a letter dated August 2, 1967, written by defendant's attorney to plaintiff's then attorney and subscribed to by the plaintiff and representatives of the defendant. This agreement was founded upon the settlement of a dispute which arose from an earlier appointment of the plaintiff by defendant's predecessor, the City of New York. The Court inquired about the earlier appointment, but neither side produced a copy of the letter of appointment (193-194 S.M.).

On May 14, 1964, Columbia University entered into a formal agreement with the City of New York under which it undertook to operate the Harlem Hospital (Ex. R). Doctor Arthur T. Davidson was then the Chief of a surgical section on the hospital staff. He continued to serve in that capacity until the spring of 1967. At that time, defendant's officers undertook to replace the plaintiff with another surgeon. The plaintiff placed his complaint, over his replacement, before the Commissioner of Human Rights, negotiations ensued and the agreement of August 2, 1967, resulted from settlement of the proceeding (18-20 S.M., Ex. 1).

The agreement which is in issue here, provides for the plaintiff's employment by the defendant upon the conditions set forth in it. The terms, as they affect this action, are as follows:

> "Commencing on or about September 1, 1967, Dr. Davidson will spend one year at the College of

Physicians and Surgeons for special training in research and teaching techniques as well as clinical activity. The technical research training will be in the area of radioactive phosphorous uptake in the metabolism of cancer cells.

During this period of one year, Dr. Davidson's appointment as visiting surgeon at Harlem Hospital will continue and he will recieve his salary at the annual rate of $24,000.00.

The Dean and the Chairman of the Department of Surgery of the College of Physicians and Surgeons recognize the desirability for Dr. Davidson, as a surgeon, to have patient operating privileges at a voluntary hospital. As an immediate measure, Dr. Davidson will have operating privileges at Francis Delafield Hospital. An effort will be made by the Chairman of the Department of Surgery of the College of Physicians and Surgeons to obtain operating privileges for Dr. Davidson at a well regarded voluntary hospital.

At the end of the year to be spent by Dr. Davidson at the College of Physicians and Surgeons, he will continue in the program outlined in paragraph 2 above, if that course should be deemed of mutual interest by Dr. Davidson and the Chairman of the Department of Surgery of the College of Physicians and Surgeons. Other wise, he will return to the clinical service at Harlem Hospital as chief of a surgical section or in some other mutually agreeable, equivalent position."

On about September 1, 1967, the plaintiff began his training at the College of Physicians and Surgeons, retaining his title of visiting surgeon at Harlem Hospital.

His salary was continued at $24,000.00 per year (21, 58-60, 69, 151-152 S.M.). He was provided with a fully equipped laboratory in the Institute of Cancer Research at Francis Delafield Hospital and given access to all of the Institute's research facilities, personnel and library (60-63 S.M.). In addition, he acted as an attending surgeon and participated in the rounds for the surgical service (65 S.M.). A member of the Institute's research staff was assigned to assist him and teach him research techniques (63-65 S.M.).

Dr. Ferrer also offered plaintiff a choice of positions after the completion of his year of training. These included the position of Cancer Coordinator for the people of the Harlem community, Section Chief at the Harlem Hospital and an appointment to the Columbia University faculty of surgery. He refused them (180-182 S.M.).

On May 27, 1968, Dr. George Humphreys of the College of Physicians and Surgeons wrote to the plaintiff offering to continue his assignment and outlining the program and its planned future development in which plaintiff would participate as a section chief and coordinator (22, 152-153 S.M., Ex 2).

On June 7, 1968, plaintiff and Dr. Humphreys discussed the matters about which Dr. Humphreys had written on May 27. Humphreys testified that he tried to find the mutually agreeable solution in fulfillment of the agreement of August 27, 1967 by offering the plaintiff alternative positions, but plaintiff declined to accept any position other than that of chief of a surgical section. He agreed to continue in his position at Delafield Hospital only for one more year (153-154 S.M.).

The plaintiff continued his training at Francis Delafield Hospital for a second year, at a salary of $25,000.00,

with the same facilities and privileges as in the first year (39, 69, 118, 151-154 S.M.).

In July, 1968, plaintiff wrote a letter which was published in the Amsterdam News in which he charged Columbia University with practicing genocide against the people of Harlem in the management of Harlem Hospital and Francis Delafield Hospital (26-28, 74 S.M., Ex. 3). On July 25, 1968, the Chairman of the Medical Executive Committee wrote to four organizations in Harlem asking that they attend a meeting to be held on August 2, prepared to discuss the charges which plaintiff had made publicly (185 S.M., Ex. L). Subsequently, on August 23, 1968, the Executive Committee of the Medical Board met. The plaintiff attended the meeting, which lasted about an hour and a half. Plaintiff was called upon to substantiate the public charge which he had made, but failed to offer any evidence in support of them (32, 74-76, 185-192, 195 S.M., Ex. M).

Dr. Jose Ferrer, who was Director of the Surgical Service at Harlem Hospital, met the plaintiff late in August, 1968, told him that he thought plaintiff's charges were unproven and asked him to retract them. Plaintiff refused (195-196 S.M.).

On September 10, the Medical Board voted to censure the plaintiff for the unproven allegations which were printed in the Amsterdam News over his signature (Ex. A).

In August and September, 1968, Dr. Ferrer and Dr. Humphreys discussed the plaintiff's future position. He was offered the position of cancer coordinator, with rank of section chief, or the position of chief of surgical clinics, also as a section chief, or the assistance of the administra-

tion in obtaining a position in a private hospital where he could devote his time to the private practice of surgery. *All of those offers were contingent upon his retracting his charges of genocide* (195-198 S.M., Ex. O). *Plaintiff was told that the charge which he had made was a serious one, and that he was not wanted in any position unless he retracted them. He refused* (94-95, 198 S.M.).

The plaintiff's ability to perform the duties of a member of the staff at Harlem Hospital were severely limited by the publication of his letter of accusation (157, 183-184, 195-196 S.M.).

Dr. Humphreys again discussed plaintiff's assignment with him in January, 1969. He pointed out to plaintiff that the City of New York had ceased to pay his salary, because he was not working at Harlem Hospital and told him that the University would pay it until June 30, 1969 only. No agreement was reached (153-162 S.M., Ex. 1).

In June, 1969, Dr. Ferrer again offered plaintiff the three (3) positions which had been offered to him previously (199-202 S.M.). Again, appointment was declined.

The plaintiff's salary was terminated on September 30, 1969, without parties ever having reached a mutually agreeable assignment of Dr. Davidson.

The plaintiff is not entitled to specific performance of the employment contract. The plaintiff alleged that the position of chief of a surgical section at Harlem Hospital is unique, but did not prove its uniqueness. Moreover, the contract did not require that he be assigned as a chief of a surgical section, but permitted such assignment only if "that course should be deemed of mutual interest by Dr. Davidson and the Chairman of the Department of Surgery of the College of Physicians and Surgery". Obviously, such

assignment was not one of mutual interest. Furthermore, the legal remedy of redress in money damages, in the absence of uniqueness and in the absence of mutuality of remedy, is an adequate remedy in such a situation. Lack of mutuality of remedy is a major reason, of course, in denying specific performance of a personal service contract, since the employer would not be entitled to invoke this remedy against the employee if the roles were reversed. See New York Jurisprudence, Specific Performance, § 47, Vol. 55, pp. 525-528 and the authorities there cited.

The defendant is not entitled to damages, for two reasons. The first is that he has not proven that the defendants breached the contract with him. The agreement provided for alternative means of performance. The University was not bound by it to assign Dr. Davidson as a chief of a surgical section at the end of his period of training. It provided him with all it had agreed to provide him and more, during the training period and at the end bent every effort to furnish him with professional employment for which its administration believed him suited.

The second reason is that plaintiff sustained no damage. He did not produce documentary proof of his earnings after his severance from the University, but the evidence showed that he was employed by the New York State Narcotics Addiction Control Commission from May, 1970 to May, 1972, at an annual salary of $25,000.00 (93 S.M., Ex. F), and that while so employed he was paid a bi-weekly salary of $450.00 by the Brooklyn State Hospital, plus $250.00 by the two medical groups which employed him. (102-104 S.M.). Thus, it appears that the plaintiff, in the years immediately after he left Columbia earned about twice the $24,000.00 or $25,000.00 annual salary which he had received from it.

Were it not for the persuasive effect of the foregoing, the Court would feel constrained to dismiss the complaint because "*the plaintiff also breached his duty of loyalty by making public, unfounded charges against the University*" which were designed to place it in disrepute and to undermine public confidence in it. Such breach of loyalty necessarily redounded to the discredit of the plaintiff and greatly lessened his ability to perform his duties. See New York Jurisprudence Master and Servant, § 29, Vol. 36, pp. 442-443 and the authorities there cited.

The foregoing constitutes the decision of the Court pursuant to CLR 4319.

Judgment of the Appellate Division, Second Department, Dated September 27, 1976

At a term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on September 27, 1976.

HON. HENRY J. LATHAM,
Acting Presiding Justice,

HON. CHARLES MARGETT,
HON. SAMUEL RABIN,
HON. VITO J. TITONE,
HON. JOSEPH F. HAWKINS,
Associate Justices.

Order on Appeal from Judgment—

Civil Action or Proceeding

ARTHUR T. DAVIDSON,
Appellant,

—v.—

COLUMBIA UNIVERSITY, et al.,
Respondents.

In the above entitled cause, the above named Arthur T. Davidson, plaintiff, having appealed to this court from a judgment of the Supreme Court, Westchester County, entered March 26, 1976 (the notice of appeal has been treated as valid pursuant to CPLR 5520 [subd. (c)], which is in favor of defendants, after a non-jury trial; and the said appeal having been submitted by Arthur T. Davidson, appellant *pro se* and argued by Anthony Limitone, Jr., Esq., of counsel for the respondent, and due de-

Order of the Appellate Division, Second Department, Dated September 27, 1976

liberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed, with costs.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

September 14, 1976

1410E

Arthur T. Davidson, appellant, v. Columbia University, et al., respondents.

Arthur T. Davidson, New Rochelle, N.Y., appellant *pro se.*

Thacher, Proffitt & Wood, New York, N.Y. (Anthony Limitone, Jr. and Robert S. Stitt, of counsel), for respondents.

In an action *inter alia* to recover damages for breach of contract, plaintiff appeals from a judgment of the Supreme Court, Westchester County, entered March 26, 1976 (the notice of appeal has been treated as valid pursuant to CPLR 5520 [subd. (c)], which is in favor of defendants, after a non-jury trial.

Judgment affirmed, with costs.

We agree with Trial Term that if there was any breach in this case it was by the plaintiff, and that, in any event, plaintiff has not shown any damages as the result of the termination of his employment.

LATHAM, Acting P.J., MARGETT, RABIN, TITONE and HAWKINS, JJ., concur.

Denial of Motion for Leave to Appeal to the Court of Appeals, Entered on November 22, 1977

STATE OF NEW YORK,

COURT OF APPEALS

At a session of the Court held at Court of Appeals Hall in the City of Albany on the fifteenth day of November A.D. 1977.

Present, HON. CHARLES D. BREITEL,

Chief Judge, presiding.

2 Mo. No. 927

ARTHUR T. DAVIDSON,

Appellant,

—VS.—

COLUMBIA UNIVERSITY, et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

JOSEPH W. BELLACOSA
Clerk of the Court